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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,
Petitioner,

v.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, is filed with the consent of the parties and in support of the petitioner, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The court of appeals in this case precluded a state from administering and enforcing a state statute requiring individuals who seek to enter an hazardous line of work to be licensed where the licensing requirements serve substantially to protect the general public and em-

ployees as members of the public, and where there is a federal standard under the Occupational Health and Safety Act (the "OSH Act") setting employer requirements with regard to same kind of work and where the state statute is not part of a state occupational health and safety plan approved by the Occupational Safety and Health Administration ("OSHA").

1. Licensing of those who do hazardous work is a traditional state function of long standing. In many instances, the very requirements set for licensing will protect both the public in general and the licensed individual and his or her co-workers, for the simple reason that both groups are exposed to similar dangers from similar operations. Thus, the OSH Act preemption rule adopted by the Seventh Circuit is likely to subject a broad range of occupational licensing statutes to federal suppression.

2. This Court's cases establish two presumptions against preemption of a state law of the kind at issue here, and require a showing of a congressional purpose to invalidate such a state law that is "clear and manifest".

First, because the states have traditionally fulfilled the function of licensing those who do hazardous work in the public interest—over one hundred years ago, this Court commented that this state power had been exercised since "time immemorial". *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)—there is a general presumption against federal interference with continued exercise of this historic state authority.

Second, there is a particularly strong presumption against federal invalidation of state health and safety protective measures.

3. No "clear and manifest" purpose to displace state public health and safety protective licensing statutes is to be found in the OSH Act's explicit language. Indeed, it is questionable that the OSH Act manifests *any* clear intent to displace state health and safety provisions *more* protective than overlapping federal OSHA standards.

To the extent there is such an intent, it could only inhere in OSH Act § 18(b), 29 U.S.C. § 667(b), providing that a state wishing to assume responsibility for promulgating and enforcing an "occupational health and safety standard" related to an occupational health and safety issue must comply with the requirements of OSH Act § 18(c), 29 U.S.C. § 667(c) and obtain federal approval. But the term "occupational health and safety standard" can, should, and has heretofore been read (including by OSHA, the administering agency) as a term of art, encompassing not *all* state laws with an occupational health and safety impact, but only standards specifying *discretely* the duties of employers *qua* employer, for the purpose of protecting the health and safety of their employees *qua* employee, not as members of the public at large. So read, § 18(b) would not reach occupational licensing statutes such as the one in this case.

4. The OSH Act's legislative history does not supply the requisite "clear and manifest" preemptive intent not to be found in the statutory language. To the contrary, it is clear that Congress perceived a vacuum in the states' protection of health and safety only with respect to regulatory schemes that focus on the *particular* health and safety responsibilities of employers *qua* employer interests of employees *qua* employee, not with respect to statutes protecting public health and safety generally that include employees as members of the public.

5. Finally, these is nothing in the statutory structure as a whole sufficient to overcome the strong presumption against preemption of a state statute of the kind at issue here. The Seventh Circuit supposed that Congress' intent was simply to require that statutes be submitted to the OSHA state plan approval process so as to oust the parallel federal regulation. That supposition cannot withstand reasoned examination. The state plan requirements of OSH Act § 18(c) are singularly inapt as applied to state occupational licensing statutes, and would almost certainly, if applied, result in voiding the state authority

to protect public health and safety in this way. Since there is no indication that Congress intended this result, and certainly no such indication of the requisite clarity, the opinion below cannot stand.

ARGUMENT

The question in this case is whether a state statute that requires a license to do certain kinds of work, enacted for the purpose of protecting the *public* health and safety, and having that effect, is preempted by § 18 of the federal Occupational Safety and Health Act (the "OSH Act"), 29 U.S.C. § 667.[1] The question arises where the state licensing standards that protect the public generally also serve to protect employees.

The Seventh Circuit maintained that where a state statute serves to protect at once the larger public and, in a substantial and direct way, employees present on a worksite, there is OSH Act preemption of the *entire* state statute as long as there is (1) an overlapping federal occupational health and safety standard and (2) no federally approved state plan including the state statute in question. In the argument that follows we demonstrate

[1] The Seventh Circuit's opinion proceeds from the premise that enhanced public health and safety *is* both a true purpose and effect of the Illinois licensing statute, and adopts an OSH Act preemption rule to govern when there is a true dual purpose and effect statute. *See* 918 F.2d at 679 (second step of two-step inquiry requires that the courts "strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed"); *id.* at 683 ("Illinois' 4000-hour rule directly, clearly and substantially implicates worker health and safety as well as public health and safety."); *id.* at 683 n.15 (characterizing the evidence submitted in an attempt to debunk the public health interest in the 4000-hour experience requirement for licensing certain hazardous waste workers as "inconclusive").

Thus, this is *not* a case in which a state statute has been invalidated on the ground that the state asserted a "sham" public health and safety goal in an attempt to insulate from preemption a statute whose only true purpose and effect is on workplace safety. *Cf. Pacific Gas & Elec. Co. v. State Energy Resources and Development Comm'n*, 471 U.S. 190, 216 (1983).

the multiple errors in that overly expansive view of OSH Act preemption.

1. *Impact of the Seventh Circuit's OSH Act Preemption.* At the outset, it is helpful to consider in some detail the scope and nature of the likely impact of accepting the Seventh Circuit's approach.

The statute in question here is one which sets standards for engaging in a particular line of work: hazardous waste operations worker or hazardous waste equipment operator. Establishing such "conditions imposed . . . for the protection of society" is a traditional state activity, as this Court noted more than one hundred years ago. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889):

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity. . . . As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely.[2]

[2] The workers who are required to be licensed varies from state to state. Illinois has enacted several statutes in addition to the one in question here, which set standards for doing certain work. *See, e.g.*, Ill. Rev. Stat. ch. 111, ¶¶ 1103-40 (1978 & Supp. 1991) (nurses); Ill. Rev. Stat. ch. 111, ¶¶ 8003-22 (1978 & Supp. 1991) (fire protection employees). Many other states license construction workers who engage in particularly dangerous or difficult trades, or who work on specific kinds of especially dangerous projects. *See, e.g.*, Minn. Stat. §§ 326.241-248 (1990) (electricians); Minn. Stat. §§ 326.37-46 (1990) (plumbers); Minn. Stat. § 183.38 (1990) (boiler engineers); Minn. Stat. §§ 1031.111, .205, .501, .525 (1990) (well constructors). In numerous instances these statutes overlap the federal occupational health and safety standards. *Compare, e.g.*, Minn. Stat. §§ 326.241-248 (1990) (setting standards for electricians) *with* 29 C.F.R. §§ 1910.302-1910.335 (1991) (setting standards for electrical work); and Ill. Rev. Stat. ch. 111, ¶¶ 8003-22

See also, e.g., W. Morris, *Revocation of Professional Licenses by Governmental Agencies* 5 (1984); Cal. Bus. & Prof. Code § 101.6 (purpose of licensing is to ensure "that those private businesses and professions deemed to engage in activities which have potential impact upon the public health and safety are adequately regulated.")

Licenses are typically required where the work if not properly performed creates serious physical dangers either to particular individual members of the public, or to the public at large. Improperly trained plumbers, for example, can cause extensive water damage; improperly trained boiler engineers can cause explositions; improperly trained electricians can cause electrocutions; and improperly trained health professionals can foster rather than contain the spread of infectious disease.

At the same time, there is likely to be substantial overlap between licensing requirements designed to protect the public and those which, either for the same reasons or others, substantially aid in preventing injuries to the licensed worker himself or to his fellow employees. Electricians, for example, are required to have training to assure that they can wire a building in a way that does not cause electrocutions; if those skills are lacking, the supposed electrician is at least as likely to electrocute herself, or a fellow employee, while installing the wire as to injure a later user of the building. If a boiler explodes, the first person likely to be injured is the nearby tending engineer himself, although there may well be injuries to other inhabitants of the building, and of nearby buildings, as well.

Similarly, health care professionals are expected to learn how to treat infectious patients so that the infection is not spread to others. Among the others to whom infection may be spread if proper precautions are

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(1978 & Supp. 1991) (setting standards for fire protection employees) *with* 29 C.F.R. §§ 1910.157-1910.165 (1991) (setting standards for fire protection work).

not taken are, of course, fellow employees; indeed, those employees are in some instances at the greatest risk of contracting disease, although other patients and the public at large are also in danger. *See* 54 Fed. Reg. 23042 (May 30, 1989) (proposed rule governing occupational exposure to blood-borne pathogens).

A further instance of the unitary nature of public and employee health and safety protection provided by licensing is detailed in an illuminating manner in two court of appeals cases addressing the same OSH Act preemption issue involved in this case. *See Associated Indus. of Massachusetts v. Snow*, 898 F.2d 274, 2801, 81 (1st Cir. 1990); *see also Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 57 (2nd Cir. 1988). *Associated Indus. of Massachusetts* involved detailed state licensing standards designed to assure that asbestos workers are knowledgeable concerning the health hazards caused by asbestos and instructed in ways of avoiding the spread of airbrone asbestos through proper worksite preparation and practice, decontamination, and proper personal hygiene.

It is clear that a major purpose and effect of the Massachusetts asbestos licensing standards was protection of the general public. The training curriculum required as a precursor to licensing or certification, for example, was adopted nearly verbatim from the curriculum developed by the federal Environmental Protection Agency for the express purpose of assuring the safety of children and staff in schools undergoing asbestos abatement. The EPA regulations in question make clear that the standards set out are *not* designed as employee safety and health protections. *Associated Indus. of Massachusetts v. Snow, supra*, 898 F.2d at 280 & n.6.

Nonetheless, as the First Circuit went on to state, (*id.* at 281 & n.7), many of the methods used to assure against the release of airborne asbestos into the building at large also protect against release within the im-

mediate area of the work, and thereby directly and substantially protect employees from excess asbestos exposure. That being so, *Associated Indus. of Massachusetts v. Snow*, *supra*, presented a situation in which there is substantial overlap between a public safety regulation and an Occupational Safety and Health Administration ("OSHA") standard covering the training of asbestos abatement workers, although there are differences as well. *See* 898 F.2d at 277, 281.

The general licensing requirements in this case, similarly operate to protect the public health and safety through a *single*, inseparable set of requirements that also protect employee health and safety: There was testimony, for example, that improper handling of hazardous wastes could result in leakage of the wastes while in transit, rainwater run-off of the hazardous waste, or explosions or fires allowing noxious fumes to escape from the hazardous waste site into the surrounding vicinity. R. Doc. 73-2, pp. 138-39, 143-45, 149-50, 156. Improper handling can also, of course, contaminate the workers themselves. *See* 29 C.F.R. § 1910.120(j) (1991) (provisons in OSHA standard governing "[h]andling drums and containers.") Training in proper handling, and experience requirements designed to assure that operators of cranes and other heavy duty equipment used in lifting and moving the wastes do not cause spills through improper operation of the machinery, therefore could—and likely would—protect at once *both* the public at large and on-site employees.[3]

[3] Illinois has not yet issued regulations concerning the exact content of the required training. 918 F.2d at 684. Consequently, no issue has yet arisen concerning any aspect of the training requirements. Should any of those requirements once formulated turn out to lack a public health impact, a separate OSH Act preemption question would then be ripe for consideration. *See Environmental Encapsulating Corp. v. City of New York*, *supra*, 855 F.2d at 57; *Associated Indus. of Massachusetts v. Snow*, *supra*, 898 F.2d at 280.

For the same reason, there is no issue in this case concerning any *actual conflict* between the state training standards and the over-

Thus, it is *typical* of licensing systems for high-risk work that the same skills requirements—and the same methods of stating and measuring the skills demanded—will protect *both* the public at large and fellow employees. And it is therefore typical as well that in this licensing context it is not feasible to "extricate from the state law . . . those provisions that relate to worker health and safety in a direct, clear and substantial way." 918 F.2d at 679.

Put another way, in a licensing situation of this kind, it is often the case (as was true of the EPA regulation adapted in *Associated Indus. of Massachusetts v. Snow*, *supra*) that if the state had in mind the general public interest *alone* and had no concern with the interests of fellow employees, it would enact *precisely the same requirements* for licensure, having precisely the same employee protective impact.[4]

lapping OSH Act standards. Indeed, the Seventh Circuit did *not* address *any* question concerning "conflict" preemption arising from the particular state regulations in question, but considered only the general issue whether Congress intended entirely to displace Illinois' dual-impact licensing of hazardous waste workers, regardless of the particular licensing standards imposed. The argument we make is therefore similarly directed to that issue.

Nothing in this brief, therefore, is intended to suggest that a state-prescribed dual-impact requirement that is directly inconsistent with an OSH Act standard in the sense that an employer could not comply with both, or in the sense that the state requirement would undermine the efficacy of the federal standard, would be valid.

Rather, it is our premise that if the analysis in this brief is accepted, conflict preemption inquiries would remain open, and would assure that uniform federal OSH Act standards are fully enforceable in workplaces. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Insofar as any conflict preemption issues are raised on the present record, those issues could be addressed on remand.

[4] The preemption question presented by licensing programs such as the one in this case and those in *Associated Indus. of Massachusetts v. Snow*, *supra*, and *Environmental Encapsulating Corp. v. City*

The Seventh Circuit, and the Solicitor General in the Brief for the United States as *Amicus Curiae* on the *Certiorari* Petition ("U.S. Br."), maintain that in enacting the OSH Act in 1970, Congress intended "dual-impact" state licensing laws like the ones just discussed to be considered "occupational health and safety standards" for purposes of § 18 of the OSH Act; the Act's preemption provision.

Section 18(b) of the Act provides in this regard that

> [A]ny State which, at any time, desires to assume responsibility for development and enforcement therein of *occupational safety and health standards* relating to any occupational safety and health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement. [Emphasis supplied.]

And § 18(c) provides that the Secretary of Labor shall approve state plans that meet the requirements set out therein. The court of appeals, and the United States, read §§ 18(b) & (c) as invalidating *in their entirety*—*viz.*, with regard both to their public health and safety

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of New York, supra, on the one hand, and by "right to know" statutes such as the one involved in *New Jersey State Chamber of Commerce v. Hughey ("Hughey I")*, 774 F.2d 587, 593 (3rd Cir. 1985) are quite distinct.

In *Hughey I*, the state right-to-know law in question contained certain protective provisions applicable both within and outside the workplace and also imposed requirements on *employers* particularly with regard to toxic substances dangerous only within the workplace. *See also New Jersey State Chamber of Commerce v. Hughey ("Hughey II")*, 868 F.2d 621 (3rd Cir. 1989), *cert. den.*, 492 U.S. 920 (1989); *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3rd Cir. 1986), *cert. den.*, 464 U.S. 815 (1987). The Third Circuit in these three cases concluded that in certain circumstances, even *workplace-specific protective provisions* having no larger public safety impact may be valid, where the provisions are part of an overall scheme whose primary purpose is protecting the public health and safety. *Hughey II*, 868 F.2d at 626. Because this case does not present this more difficult question, we do not address it in this brief.

protective, and their employee protective, purposes and effects—any and all state licensing laws as to which there is an overlapping OSHA standard, unless the state licensing provisions are incorporated in a state plan approved under § 18(c).

2. *Applicable Preemption Principles.* This Court's preemption decisions unequivocally establish that this reading of the OSH Act is proper if, *and only if*, the statutory words make it undeniably plain that Congress intended to preempt such state licensing laws.

First, as a general matter, there is a presumption against federal interference with state legislation in "areas that have been characteristically governed by the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, supra*, 461 U.S. at 205. This inquiry is largely an historical one. *See id.* at 206 (because "economic aspects of electrical generation have been regulated for many years and in great detail by the States," there is an assumption the Congress did not intend to displace the states regulatory power over economic (as opposed to safety) aspects of nuclear power generation); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) ("[g]iven the long history of state common-law and unfair business practices, it is plain that this is an area traditionally regulated by the States" and therefore "appellees must overcome the presumption against finding preemption of state law in areas traditionally regulated by the States.").

Here, as already noted, setting occupational standards through licensing requirements had, by 1889, "been the practice of different states, from time immemorial." *Dent v. West Virginia, supra*, 129 U.S. at 122. Thus, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest pur-

pose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

"The second obstacle in [respondent's] path is the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Again, as noted above, state licensing law such as those here have long been understood as justified by concerns for public health and safety. *Dent v. West Virginia, supra*, 129 U.S. at 122. The Illinois statutes, on their face, and the record in this case establish that the licensing requirements at issue were established because of the dangers to public health involved in hazard waste cleanup activity. *See also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (pollution legislation "falls within the exercise of even the most traditional concept of what is compendiously known as the police power").

Consequently, to prevail in this case, respondent "must present a showing of . . . preemption . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County v. Automated Medical Laboratories, Inc., supra*, 471 U.S. at 716.

3. *The Statutory Language.* The provisions of the OSH Act that address the relationship between state and federal law do not "clearly and manifestly" evince a preemptive purpose with respect to dual-impact state licensing statutes such as those at issue here. To the contrary, OSH Act § 18 indicates, at most, an intention to displace only state "*occupational*" health and safety standards directed at employers *qua* employer and employees *qua* employee and not an intent to displace *any and all* state regulation of general application that, among other things, affect occupational health or safety.

(a) To begin with, § 18(a), which provides that "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which *no* standard is in effect under . . . this title," is a simple savings clause that does *not* address at all the question whether and under what circumstances there *is* preemption when there *is* a federal standard in effect.

"Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to preempt [state] authority." *Wisconsin Public Intervenor v. Mortimer*, —— U.S. ——, 111 S. Ct. 2476, 2483 (1991). Indeed, the language of § 18(a) is not that of an exception or an authoritative grant of permission, but of a clarifying proviso, designed to dispel any inference of *implied* OSH Act preemption in the absence of a relevant federal OSH Act standard. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 583-584 (1988). Under the OSH Act, employers have, in addition to the duty to comply with specific federal occupational safety and health standard, the duty "to furnish each . . . employee[] employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." OSH Act § 5(a)(1), 29 U.S.C. § 64(a)(1); *see also* OSHA § 8(c), 29 U.S.C. § 657(c) (establishing general employer record keeping requirements. Thus, § 18(a)'s office is to make clear that such general statutory requirements alone do not serve to displace any state laws whatever.

(b) Since OSH Act § 18(a) is therefore of no pertinence to ascertaining when an OSH Act standard preempts state law, § 18(b) is the only express statutory source for displacing a state licensing law with both significant public safety and employee safety aspects.

We assume, for present purposes, that § 18(b)—read in conjunction with § 18(c) and with the OSH Act's legislative history—does carve out *some* area within which the states cannot act at all, even to enforce state health and

safety regulations more stringent than an overlapping OSHA standard, in the absence of an approved state plan.[5]

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[5] We hasten to add that despite the unanimity with which the administering agency and the lower courts have embraced this proposition, the evidence supporting it, read in light of the Court's most recent case law concerning the degree of certainty with which a preemptive intent must be shown, is relatively weak. *See generally Wisconsin Public Intervenor v. Mortimer, supra.*

Section 18(b) does not, clearly or otherwise, declare that non-conflicting state laws are ousted if the state addresses an occupational safety and health issue covered by a federal OSHA standard. Nor is such a declaration a necessary inference from the language and statutory function of § 18(b).

Contrary to the heretofore prevailing reading of the provision, § 18(b) does *not* provide that "if a State desires to develop and enforce its own occupational health and safety standards [where a federal standard is in place], . . . it must submit a state plan for federal review." U.S. Br. at 10.

Rather, and critically, § 18(b)'s language requires a state plan only where a state desires to "*assume responsibility* for development and enforcement therein of occupational safety and health standards. . . ." 29 U.S.C. § 667(b) (emphasis supplied). And § 18(e), 29 U.S.C. § 667(e) in turn, provides that where a state plan is submitted and approved, the state shall have *sole* responsibility of the particular occupational safety and health issue in question, to the *exclusion* of the federal government. To read § 18(b) as if the words "assume responsibility" were not there is therefore both to assign those words no role whatever, and to ignore their very real significance given the overall statutory scheme.

The legislative history the United States now points to as supporting its construction of § 18(b) (U.S. Br. at 12 n.3), moreover, has quite the opposite import: To be sure, there were two draft bills introduced but not enacted that would have provided expressly that state safety or health standards providing greater protection than a federal standard shall not be superseded. U.S. Br. at 12 n.3, *citing* Subcomm. on Labor, Senate Comm. on Labor & Public Welfare, 92nd Cong., 1st Sess., *Legislative History of the Occupational Safety & Health Act of 1970*, at 58, 706 (Comm. Print 1971) ("Leg. Hist."). Those same draft bills, however, also contain an immediately succeeding provision with essentially the same language as § 18(b) of the final Act, and also contain a section parallel to present § 18(c). *Id.* at 59, 707. Thus, if anything, those draft bills demonstrate that § 18(b) *is* compatible with the validity of more stringent

On that assumption, the preempted field is, in § 18(b)'s words, the "development and enforcement . . . of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated".

Every court of appeals that has had occasion to consider these words—including the Seventh Circuit in this case—has concluded that this statutory proscription upon certain state "occupational health and safety standards", if such it is, cannot be read as "clearly and manifestly" proscribing enactment of any and all state statutes with an occupational health and safety purpose or effect, *if that state statute has a broader purpose and/or effect as well. See* 918 F.2d at 677 ("The language of section 18 . . . does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted."); *New Jersey State Chamber of Commerce v. Hughey, supra,* 774 F.2d at 593; *Environmental Encapsulating Corp. v. City of New York, supra,* 855 F.2d 56-57; *Associated Indus. of Massachusetts v. Snow, supra,* 898 F.2d at 279-280.

Thus, at the very least, the OSH Act's language and structure are inconclusive as to the Act's preemption of state dual purpose and/or effect statutes. Applying the strong presumption against preemption in the current context, that ambiguity is sufficient to preclude the finding that Congress intended to preempt such state enactments. That, moreover, is only the most apparent flaw in the arguments for according § 18(b) a broad preemptive reach.

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state laws in non-state-plan states. *See Wisconsin Public Intervenor v. Mortimer, supra,* 111 S. Ct. at 2484 (no inference of preemption of local governmental activity can be drawn from the failure to enact language expressly authorizing such activity.); *see also* 918 F.2d at 687 (Judge Easterbrook, *dubitante*) (refuting the Seventh Circuit majority's reliance on an *unenacted* proposal as indicating a preemptive intent).

The fact of the matter is that the statutory language affirmatively points to the conclusion that the term "occupational health and safety standard" as used therein is a *narrow term of art* that does *not* encompass *any and all* laws or regulations with some impact on employee health or safety.

It is significant in this regard that while Congress could easily have done so, the Legislature did not write § 18(b) to say that the states must seek federal approval to assume responsibility for *any and all* state health or safety laws or regulations, or even *any and all* state health and safety "standards" that "relat[e] to any occupational health and safety issue" covered by a federal standard issued under the Act. Instead, § 18(b) speaks only of "*occupational* health and safety standards" addressed to "occupational health and safety issues". This limited terminology demonstrates an intent to invalidate, at most, a *subset* of those state health and safety standards that "relate to" occupational safety and health issues. *Cf. International Union UAW v. Johnson Controls, Inc.*, —— U.S. ——, 111 S. Ct. 1196, 1204-05 (1991).[6] And, the term "occupational health and safety standard" does not, for two reasons, include a licensing statute such as the one here at issue.

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[6] For this reason among others, any attempt to draw analogies to this Court's cases construing the broad express preemption language of § 514(a) of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a) must fail: ERISA expressly "supersede[s] any or all State laws" that "relate to" employee benefit plans, and broadly defines "State law." *See* §§ 514(a), and (c), 29 U.S.C. §§ 1144(a) and (c). The OSH Act, in contrast, has no such explicit preemptive language, and affects only state "occupational health and safety standards." Moreover, the OSH Act explicitly does *not* preempt a large category of state laws that do "relate to" employee health and safety issues—*viz.*, "common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." OSH Act § 4(b)(4), 29 U.S.C. § 653(b)(4).

First, a dual-impact licensing statute such as the one here protects employees—along with all others—as members of the larger class of the general public. While such statutes may have a substantial employee protective effect, and, as here, even an employee protective purpose, both the danger from which employees are protected and the way in which the protection is accomplished are no different for employees and for other members of the public at large.

Second, a licensing statute focuses both its requirements and its sanctions on the licensed individual, who may or may not be an employee, *not* on the employer. In contrast, "OSH Act's stated purpose is to force *employers* to ensure that employees have safe working conditions . . . not to punish employees." *United States v. Doig*, —— F.2d ——, 1991 U.S. App. Lexis 28549 (7th Cir. Dec. 5, 1991) (emphasis added) (holding that under OSH Act, no criminal sanctions can be imposed upon employees).

(c) The United States would read the OSH Act differently than we do and differently than every court of appeals that has addressed the Act's preemption provisions: "[A] straightforward reading of the statute", the United States maintains, supports the conclusion that a dual-impact state regulation with a significant employee-protective impact is necessarily an "occupational safety and health standard," and therefore comes within the purported preemptive impact of § 18(b). U.S. Br. at 16.

This supposed "straightforward" reading, in the first place, entirely ignores this Court's oft-repeated admonition that federal enactments are to read in a way that resolve doubts *against*, rather than in favor, of preemption in areas, such as state licensing, that are both traditionally occupied by the states and involve health and safety matters.[7]

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[7] For example, the United States notes that the statutory definition of "occupational safety and health standard", OSH Act § 3(8),

The United States' present position is, in addition, inconsistent with OSHA's past pronouncements about § 18's preemptive reach. Soon after the statute was enacted, for example, OSHA announced that "it was not Congress' intent in passing the Act to preempt the [] extensive activities [of state and local fire marshals] with respect to places of employment covered by the Act." OSHA Policy Statement, April, 1972, *reprinted in* 1984 CCH Employment Safety & Health Guide Paragraph 5008.81.

OSHA explained that "despite the promulgation of § 6 standards substantially the same as those enforced by fire marshals" and "the overlap of jurisdiction in workplaces," there could be no § 18(b) preemption of state fire marshal laws because of "the much broader goals of fire marshals' activities." *Id.; see also* OSH Act *Instruction* STP 2-1.10A, Mar. 13, 1981, *reprinted in* 1984 CCH Employment Safety & Health Guide Paragraph 5008.71 ("the enforcement activities of States without an approved 18(b) plan would not be affected . . . [with respect to] enforcement of standards which on their face are predominantly for the purpose of protecting a class of person larger than employees . . . .") Thus, OSHA has in the past recognized that a state enactment that treats employers and employees not *qua* employer and *qua* employee but as members of the larger public is not preempted by the OSH Act.

OSHA has also in previous pronouncements agreed that state safety regulations focusing their requirements and sanctions upon employees rather than upon *employers* are not displaced by the force of § 18(b). In announcing a presently pending proposed OSH Act motor vehicle safety standard requiring the use of occupant seat belts and motorcycle helmets, OSHA recognized that state motor

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29 U.S.C. § 652(8), "does not exclude state dual purpose laws from the meaning of the terms." U.S. Br. at 16. But the definition does not explicitly include such laws either, and therefore does not "clearly and manifestly" demonstrate a Congressional intent to do so.

vehicle laws also often require the use of seatbelts and motorcycle helmets, and by so doing protect employees who drive or ride in cars as part of their employment. Nonetheless, OSHA did *not* conclude that the state laws would be preempted, either in their entirety (as the United States' position in this case would suggest) or as applied to employees using cars or motorcycles in the course of employment:

> It is OSHA's intent that the proposed OSH Act vehicle occupant protection safety standards would have little, if any, preemptive effect on [state motor vehicle laws.] . . . . The typical state safety belt law is applicable directly to drivers and front seat passengers, only a few apply to rear seat passengers and the laws require occupants to remain belted while operating a vehicle. Typical motorcycle laws are applicable directly to operators. . . . Individual drivers are legally responsible for compliance, and can be sanctioned in the event of a failure to comply. The proposed OSH Act standard, in contrast, is applicable to employers, not employee/drivers. The proposed standard would impose upon employers the obligation to monitor and enforce a comprehensive occupant protection program . . . As is the case under other OSH Act standards requiring the use of personal protective equipment, the employer, not the employee, is ultimately responsible for compliance with the standard. Accordingly, it is OSHA's view that state safety belt and motorcycle helmet laws which apply to vehicle drivers or occupants . . . would not be subject to Federal preemption. [55 Fed. Reg. 28728, 28739 (July 12, 1990).]

It is these statements of the OSH Act's preemptive scope and not the United States' present litigation statement that correctly capture Congress' intent as expressed in the Act's statutory language.

4. *OSH Act Legislative History.* There is nothing in the OSH Act's legislative materials that supplies the "clear and manifest" intent to preempt state dual-impact

licensing statutes that cannot be found in the statutory language taken alone. To the contrary, those materials confirm that the problem addressed by the federal statute was the dearth of effective state programs addressing *specially and discretely* the health and safety interests of employees, and that there was no concern with, or intent to affect, longstanding, general state safety and environmental protections such as licensing programs.

Both the committee reports and the legislative debates are replete with statements that the reason for enacting a comprehensive federal employee health and safety statute was that the states did not have effective programs for promulgating standards prescribing detailed work processes to be instituted by employers for the health and safety of their employees and for enforcing such standards through on-site inspections. The concern was with the states' failure to develop programs *especially* tailored to employee health and safety needs, not with any supposed state failure to develop programs addressed to the general public's health and safety needs.[8]

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[8] See, *e.g.*, S. Rep. No. 91-1282, 91st Cong. 2d Sess. (1970) at 4, Leg. Hist. at 144 ("Nor has state regulation proven sufficient to the need. No one has seriously disputed that only a relatively few states have modern laws relating to occupational health and safety . . ."); Leg. Hist. at 343 (remarks of Sen. Saxbe); Leg. Hist. at 413 (remarks of Sen. Williams); Leg. Hist. at 457 (remarks of Sen. Schweiker) ("I would like to point out that the reason we are writing this law is because the present laws in the States have not been adequate."); Leg. Hist. at 513 (remarks of Sen. Muskie) ("Only four States have adequate standards. Standards in 38 States do not even meet one-half of comparability with those set by the American Standards Association."); Leg. Hist. at 519 (remarks of Sen. Cranston) ("At least eight States have no identifiable programs in occupational health at all. . . . [T]here are only 1,600 State safety inspectors. Four States have no inspection personnel whatsoever."); H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. (1970) at 15, *reprinted in* Leg. Hist. at 845; *Id.* at 16, Leg. Hist. at 846 (quotation of Presidential address) (emphasis supplied) ("The side effects of progress present *special* dangers in the workplaces of our country"); *Id.* at 3, 5, Leg. Hist. at 865 ("Most states are not doing a crediable job in administering occupational safety and health programs when some of them annually spend as little as two cents per worker in job safety enforcement."); Leg. Hist. at 979 (remarks of Rep. Smith) (referring to "State[] . . . industrial safety laws or standards, which have . . . been set up by their own departments of labor or their division of industrial safety"); Leg. Hist. at 1030 (remarks of Rep. Dent) ("only four or five States in the Union have respectable and workable laws in industry."); Leg. Hist. at 1032 (remarks of Rep. Dent) ("Some States claim that they do cover all or most of their working men and women under an occupational health and safety law, but in most cases it is to no avail because there are too few inspectors to enforce these laws."); Leg. Hist. at 1033 (remarks of Rep. Dent); Leg. Hist. at 1040 (remarks of Rep. Annunzio); Leg. Hist. at 1041 (remarks of Rep. Railsback) (Traditionally industrial safety programs have been aimed at the design and arrangement of the plant itself and the establishment of safety rules and practices to be followed by the employees"); Leg. Hist. at 1049 (remarks of Rep. Karth); Leg. Hist. at 1061 (remarks of Rep. Sikes); Leg. Hist. at 1078 (remarks of Rep. Helstoski); Leg. Hist. at 1090 (remarks of Rep. Randall).

Precisely because that is so, the legislative history makes clear that Congress designed the OSH Act to provide employees special protections attuned to the workplace where that is appropriate and not to displace state laws that protect the public generally, and that include employees as members of the public.[9] And there was cer-

[9] See, *e.g.*, Leg. Hist. at 514 (remarks of Sen. Muskie, incorporating letter from former Secretaries Udall, Wirtz and others); H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. at 14 (1970), *reprinted in* Leg. Hist. at 844 ("Unfortunately, national attention given to environmental problems fails to give sufficient recognition to the pertinent question of occupational safety and health. Our environment is not solely the air we breathe traveling to and from work. It is also the air we breathe at work."); Leg. Hist. at 1003 (remarks of Rep. Daniels); Leg. Hist. at 1043 (remarks of Rep. Udall) ("at a time when our country is intensely concerned with environmental problems, it is hard to accept resistance or apathy toward Federal legislation on occupation health and safety."); Leg. Hist. at 110 (remarks of Sen. Eagleton) ("We have dealt with and are still considering problems arising from the disposal of wastes which have heretofore been allowed to defile the earth and its air and waters. It is appropriate that we deal as well with the environment of the working place . . .").

tainly no mention at all of any discontent with state licensing programs of the kind at issue here.

In short, the OSH Act's history is fully consistent with the conclusion that § 18(b), if preemptive at all, is preemptive only with respect to state safety and health protective legislation addressed to employers *qua* employers and designed to protect employees *qua* employees, and not with respect to unitary, dual impact health and safety legislation that protects the general public, such as the Illinois statutes here at issue.

5. *OSH Act's Statutory Structure.* Unlike the United States, in its recent change of mind, the Seventh Circuit, as noted above, did *not* find the language of § 18 conclusive as to Congress' intent regarding dual-impact state licensing statutes. Nor was the court of appeals able to point to anything in the OSH Act legislative history that demonstrates a "clear and manifest" preemptive intent. Rather, the basis for the court of appeals' holding was its conclusion that a failure to require the states to seek approval under the § 18(c) "state plan" process for such dual impact regulations "would defeat the purpose of section 18 . . . [which is] designed to avoid subjecting workers and employers to duplicative regulation while allowing the states the flexibility to tailor work and safety programs to their own needs." 918 F.2d at 679.

In the lower court's view, the states can avoid the OSH Act's preemptive effect on dual-impact state health and safety legislation simply by submitting a state plan complying with OSH Act § 18(c). That being so, said that court, a broad reading of § 18(b) secures benefit of unitary regulation—because, on approval of a state plan, the federal government ceases enforcement of the overlapping federal OSH Act standard—at little cost.

The threshold problem with this analysis is that it assumes, without any evidence—"clear and manifest" or otherwise—that Congress intended to eliminate all cumulative—albeit nonconflicting—health and safety regulations touching the workplace.[10] But it is just as plausible—indeed, for the reasons given above, more plausible—that Congress' intent was to eliminate co-regulation toward precisely the same end, but to *allow* nonconflicting, overlapping rules to operate where the goals or direct regulatory impact differs. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n, supra*, 471 U.S. at 215; *Silkwood v. Kerr-McGee, supra*, 465 U.S. at 256. To paraphrase the point made by the *Silkwood* Court:

> No doubt there is tension between the conclusion that [occupational health and safety standards are, absent an approved state plan] the exclusive concern of federal law and the conclusion that a state may nevertheless [continue its historical role of enacting regulations that go beyond setting narrow *occupational* standards to protect, at least in part, the public safety generally.] But . . . Congress intended to stand by both concepts and tolerate whatever tension there was between them. [465 U.S. at 256.]

The second flaw in the Seventh Circuit's analysis is that the OSH Act's overall statutory structure actually points in a direction opposite from the one that court took. Contrary to the court of appeals' assumption, a state could *not* save its public health and safety protective provisions that overlap with OSH Act standards simply by submitting a § 18(c) state plan containing those provisions. In fact, a non-state-plan state would have to largely abandon its traditional role of protecting the public health and safety generally unless the state were willing to enact an entire new regulatory scheme to parallel the broad federal employee-protective programs mandated by the OSH Act.

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[10] As noted above (at n.3), to the extent the state requirements *conflict* with federal OSH Act requirements, in the sense that the state mandates behavior proscribed by the federal OSH Act standard or otherwise undermine compliance with OSH Act standards, there would be preemption.

As noted above, state plans approved under § 18(c) *replace* the federal standard promulgated with respect to the same occupational health and safety issue. *See* § 18(e), 29 U.S.C. § 667(e). For that reason, § 18(c) sets out a myriad of requirements for proper state plans, including: protection substantively "at least as effective as" federal OSH Act standards in protecting employee health and safety; assurances satisfactory to OSHA of adequate enforcement personnel and administration; provisions for inspection at least as effective as those contained in the OSH Act; and a commitment to "establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the state and its political subdivisions . . . as effective as the standards contained in an approved plan." OSH Act § 18(c)(2), (3), (4), (5) & (6). These requirements are totally inapt as applied to traditional licensing statutes that protect public health and safety.

In the first place, while the licensing requirements in the Illinois statutes here at issue are in some respects more stringent than those of the overlapping OSH Act standard, there may well be other circumstances in which a state seeking public health and safety protection will set standards that "significantly affect[] worker safety and health" (U.S. Br. at 17) and are *less* protective in some respects than a standard set with *employee* health and safety protection as the focus. Dual impact licensing statutes are likely to protect employees from those dangers that also affect members of the public; dangers that are limited to the immediate worksite, where the worksite is not open to the public, or that arise only while in the process of performing the work in question, will not ordinarily be addressed in the licensing requirements. Where that is the case, OSHA would be constrained to conclude that the licensing statute is not "at least as effective in providing safety and health employment" as the OSH Act standard relating to the same occupational safety and health issue. *See* § 18(c)(2).

Further, it does not appear that, under § 18(c), a state could submit *only* a dual purpose licensing statute for approval as a state plan. Rather, since a state plan to be approved must be "as least as effective" as the pertinent OSH Act standard, any plan submitted would have to provide for regulations at each worksite as comprehensive in scope as the overlapping OSH Act standard. Here, for example, protection of employees at hazardous waste cleanup sites is the occupational safety and health issue addressed by the OSH Act standard. And that OSH Act standard covers far more than personnel training and experience questions alone. *See* 29 C.F.R. § 1910.120 (1991) (providing, *inter alia*, for engineering controls, employee exposure limits, and site analysis procedures). Consequently, it is likely that a state licensing statute would not be approved under § 18(c) unless such detailed worksite protections directed at employee health and safety protection were added as well.

In addition, as noted above, licensing statutes, like the Illinois statute in this case, focus on the individual doing the covered work, whether an employee, an employer, or an independent contractor. For that reason, enforcement efforts are directed primarily at the individual who is or should be licensed, and not at the workplace.[11] Providing for right of entry and inspection of workplaces, and for funds for inspection personnel, as § 18(c) requires, would require recasting the statutes in a way inconsistent with their basic thrust.

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[11] The Illinois statutes here direct their enforcement efforts principally at the licensed employees: Illinois provides for fines for employees who operate without a license; for revocation of the license or fines levied against the licensed employee for various reasons, including committing gross negligence or demonstrating incompetence or misconduct in handling hazardous wastes; and for injunctions at the behest of state officials or citizens against any employee working without a license. 918 F.2d at 674. There are also provisions for fining an employer who knowingly permits an individual to work on covered work without a license. *Id.*

Finally, it is clear, because § 18(c)(6) says so expressly, that a state licensing statute could be approved only if the state were willing to provide a "comprehensive" public employee state health and safety program meeting OSH Act standards. Contrary to the soothing assurances of the court of appeals, on its reading of § 18(b), the OSH Act would largely displace the states' ability to protect public health and safety through the time-honored means of licensing unless the state were willing to undertake farreaching changes in their laws.

In short, since effectiveness for employee protection purposes is the only § 18(c) benchmark, the consequence of imposing the state plan requirement on a dual impact licensing statute is likely to be to void the state statute and by so doing to deny the public the health and safety benefits the state statute provides.[12] This result is particularly paradoxical when one considers that for employee protection purposes, the federal OSH Act standard and enforcement scheme would then remain operable, so that basic *employee* protections would be afforded in any event. Since there is no evidence that Congress intended to fundamentally impair the states' abiilty to protect *non-employee* public health and safety, the decision below cannot stand.

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[12] It is worth noting as well that in those states that do have approved state plans as to an occupational safety and health issue covered by an OSH Act standard, submitting any overlapping licensing statute to the § 18 approval process would be pointless: OSHA would have no power to disapprove a licensing requirement with public health protective aspects as long as the state plan otherwise met the "at least as effective as" requirement. This would be true even if the overlapping OSH Act standard had *no* licensing provision, or even if the requirements under the state statute included experience or testing requirements not contained in the OSH Act standard. Thus, were Illinois already a state plan state with respect to the hazardous waste removal issue, Illinois would be free to impose the very assertedly "duplicative" 4,000 hour experience requirement invalidated by the court of appeals in this case, regardless of whether the Secretary viewed that requirement as justified by employee protection goals.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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